

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

**LANDMARK LEGAL FOUNDATION  
19415 Deerfield Ave, Ste 312  
Leesburg, VA 20176**

**Plaintiff,**

**vs.**

**Case No. 12-1726 (RCL)**

**ENVIRONMENTAL PROTECTION  
AGENCY  
1301 Constitution Ave, NW  
Washington, DC 20004**

**Defendant.**

**DEFENDANT'S RESPONSE TO THE PLAINTIFF'S MOTION FOR ORDER  
REGARDING ITS UNILATERALLY FILED PRODUCTION  
AND BRIEFING SCHEDULE**

Plaintiff is seeking the Court's assistance in entering an order which goes far and above what is required for a scheduling order. Plaintiff seeks records related to communications EPA officials had with outside third parties pertaining to proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012. Complaint at ¶10. The scope of the request has been limited to the responsive records of senior officials in EPA headquarters. The parties conferred and a draft scheduling order was prepared with input by both parties for the Court's consideration. With some changes in the production deadlines, the Defendant will abide by the following schedule:

- All responsive, non-exempt records that will not be referred to the Executive Office of the President or other executive branch agency for consultation and review will be produced on or before February 7, 2013;
- A list of withheld documents will be produced along with the documents. This list shall include: (1) a list of all documents withheld in their entirety with the applicable exemption justifying why the document was withheld; and (2) with respect to partial withholdings, the applicable exemption placed on or next to the actual redaction on the redacted document itself;
- Any document that is referred to the Executive Office of the President or other executive branch agency for consultation and review and is not withheld, in whole or part, pursuant to a FOIA exemption will be produced on or before February 27, 2013<sup>1</sup>;
- After final production, within twenty (20) days, Plaintiff and Defendant will meet and confer by telephone or otherwise to discuss the exemptions claimed;
- If the parties cannot agree on the withholdings, Defendant will file any dispositive motion on or before March 30, 2013. Plaintiff will file its response within twenty (20) days of service of Defendant's dispositive motion. Defendant will file its reply within twenty (20) days of service of Plaintiff's response.

On Friday, February 2, 2013, the Plaintiff abruptly filed its own proposal because the Defendant would not agree to the following language in the joint proposed scheduling order:

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<sup>1</sup> The February 6, 2013, production deadline initially discussed by the parties is extended by one day to February 7, 2013, to complete the internal review and approval process of the documents that do not need to be referred outside of the Department. The February 20, 2013, production deadline for the review of those records referred outside of the Department has been extended to February 27, 2013.

- “EPA shall search all email accounts used by any officials subject to Plaintiff’s FOIA request, including secret alias email accounts used by EPA personnel in their official capacity, including, but not limited to, emails sent to and received from the email account of “Richard Windsor.” EPA will also require all officials subject to Landmark’s FOIA request to produce records contained in private email accounts or on private computers or other storage devices.”

See: ECF # 20 - Plaintiff’s Proposed Prod. and Briefing Schedule, item 4 at p. 3.

Plaintiff prematurely wants to challenge the Agency’s search for responsive documents before the Agency has responded and based on faulty assumptions about EPA’s search. Plaintiff does so under the guise of a scheduling order, effectively turning scheduling negotiations into another attempt to apply to the Court for a preliminary injunction. Nevertheless, EPA understands that a reasonable search for documents in this case includes all internal email accounts used by the Administrator as part of her official duties. See Exhibit A. Moreover, in response to inquiries from Congress on this very issue, EPA has plainly explained that “to comply with [FOIA and the Federal Records Act], both the public email account and the secondary email account are saved as records and are subject to FOIA requests and Congressional Oversight.” See Exhibit B. Accordingly, because the EPA will undertake a search that is reasonably calculated to uncover responsive documents, this issue is inappropriate for inclusion in a “scheduling” order. Rather, at this stage in the proceedings, the Court should simply enter dates upon which the parties can agree.

Respectfully submitted,

RONALD C. MACHEN, JR. DC Bar #447889  
United States Attorney

DANIEL F. VAN HORN, D.C. Bar #924092  
Assistant United States Attorney

/s/

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Assistant United States Attorney  
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Washington, D.C. 20530  
(202) 305-1334

# **EXHIBIT A**

**Graham-Oliver, Heather (USADC)**

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**From:** Graham-Oliver, Heather (USADC)  
**Sent:** Thursday, January 31, 2013 5:39 PM  
**To:** 'Rpetehutch' (rpetehutch@aol.com)  
**Subject:** Proposed Briefing Schedule\_Landmark Edits.docx

**Importance:** High



Proposed Briefing  
Schedule\_Lan...

Dear Pete:

EPA feels pretty strongly that the scheduling order is no place for "assurances" about the search / production. However, EPA understands that a reasonable search includes all internal email accounts used by the Administrator as part of her official duties.

In addition, I have left the 'meet and confer' provision in the Scheduling Order but the EPA has serious concerns that this session will turn into a quizzing session about various and sundry (unrelated) accusations and allegations. If that happens, the meet and confer will be unproductive and useless. However, if we are on task, the meet and confer can be productive and accomplished expeditiously. It is my hope that the latter situation will prevail.

Here are our edits.

-Heather

Heather Graham-Oliver  
Assistant United States Attorney

# **EXHIBIT B**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 12 2012

OFFICE OF CONGRESSIONAL AND  
INTERGOVERNMENTAL RELATIONS

The Honorable Ralph Hall  
Chairman  
Committee on Science, Space, and Technology  
U. S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing in response to your November 15, 2012, letter to U.S. Environmental Protection Agency Administrator Lisa P. Jackson. I appreciate the opportunity to correct the inaccuracies in the article that you cite in your letter.

The practice of EPA Administrators having a public and a secondary email address is not new. For nearly two decades, EPA Administrators have managed the agency with two email accounts: a public account and a secondary account. The email address for Administrator Jackson's public account is posted on the EPA's website and is used by hundreds of thousands of Americans to send messages to the Administrator. This account is maintained and monitored by staff, and the emails are processed as official correspondence as appropriate.

The secondary account is an everyday, working email account of the Administrator to communicate with staff and other government officials. This secondary email account is used for practical purposes. Given the large volume of emails sent to the public account – more than 1.5 million in fiscal year 2012, for instance – the secondary email account is necessary for effective management and communication between the Administrator and colleagues. This practice of maintaining one staff-managed public email address and another secondary address for use by a high-profile individual is commonly employed in both the public and private sector.

The EPA has implemented policies and procedures to comply with the EPA's legal obligations under the Federal Records Act and the Freedom of Information Act. To comply with these laws, both the public email account and the secondary email account are saved as records and are subject to FOIA requests and Congressional oversight. The secondary email address is redacted from released documents in order to avoid proliferation of use and the attendant loss of the utility of the secondary email account, and the established practice is to mark "Administrator" when redacting the secondary email address so the requestor knows the origin of the records. Thus, this



longstanding and bipartisan practice of segregating Administrator emails into public and secondary accounts does not hinder compliance with FOIA requests or Congressional oversight at the EPA.

Again, thank you for your letter. If you have further questions regarding this matter, please contact me or have your staff call Tom Dickerson in my office at (202) 564-3638.

Sincerely,



Arvin Ganesan  
Associate Administrator

cc: The Honorable Eddie Bernice Johnson  
Ranking Member